

[ERRATA]
ADMINISTRATION EFFORTS ON LINE-BY-LINE
BUDGET REVIEW

HEARING
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS
OF THE
COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES
ONE HUNDRED TWELFTH CONGRESS
FIRST SESSION

OCTOBER 5, 2011

Serial No. 112-92



Printed for the use of the Committee on Energy and Commerce
energycommerce.house.gov

U.S. GOVERNMENT PRINTING OFFICE

81-404 PDF

WASHINGTON : 2013

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[ERRATA]

112-92

The table of contents in the referenced hearing should not have included a footnote stating that witness Clinton T. Brass did not answer a submitted question for the record from Mr. Terry by the time of printing. A contents page with a revised footnote and the response follow:

C O N T E N T S

	Page
Hon. Cliff Stearns, a Representative in Congress from the State of Florida, opening statement	1
Prepared statement	4
Hon. Diana DeGette, a Representative in Congress from the State of Colo- rado, opening statement	7
Hon. Joe Barton, a Representative in Congress from the State of Texas, opening statement	8
Hon. Marsha Blackburn, a Representative in Congress from the State of Tennessee, opening statement	9
Hon. Lee Terry, a Representative in Congress from the State of Nebraska, opening statement	9
Hon. H. Morgan Griffith, a Representative in Congress from the Common- wealth of Virginia, opening statement	10
Hon. Henry A. Waxman, a Representative in Congress from the State of California, opening statement	10
Hon. Fred Upton, a Representative in Congress from the State of Michigan, prepared statement	214

WITNESSES

Clinton T. Brass, Analyst in Government Organization and Management, Congressional Research Service	25
Prepared statement	27
Answers to submitted question ¹	89
Answer to request from Mr. Griffith	101
Thomas A. Schatz, President, Citizens Against Government Waste	104
Tad DeHaven, Budget Analyst, Cato Institute	125
Prepared statement	127
Patrick L. Knudsen, Grover M. Hermann Senior Fellow in Federal Budgetary Affairs, The Heritage Foundation	135
Prepared statement	137
Veronique de Rugy, Senior Research Fellow, Mercatus Center, George Mason University	147
Prepared statement	149
Andrew Moylan, Vice President, Government Affairs, National Taxpayers Union	152
Prepared statement	154
Gary Kalman, Director, Federal Legislative Office, U.S. Public Interest Re- search Group	160
Prepared statement	162
Stanley E. Collender, Partner, Qorvis Communications	185
Prepared statement	187
Scott Lilly, Senior Fellow, Center for American Progress	192
Prepared statement	194

SUBMITTED MATERIAL

Majority memorandum, dated October 3, 2011, submitted by Mr. Stearns	13
Letter, dated September 30, 2011, from Allie Neill, Acting Associate Director for Legislative Affairs, Office of Management and Budget, to Mr. Upton and Mr. Stearns, submitted by Mr. Stearns	22

¹ The response of Mr. Brass to the submitted question for the record from Mr. Terry begins on the next page.



MEMORANDUM

November 4, 2011

To: House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations
Attention: Samuel J. Spector

From: Henry B. Hogue, Analyst in American National Government, 7-0642
Clinton T. Brass, Analyst in Government Organization and Management, 7-4536

Subject: Subcommittee Hearing, "Administration Efforts on Line-by-Line Review": Response to a Question for the Record

This memorandum responds to an October 21, 2011, letter of request from Rep. Cliff Stearns, Chairman of the Subcommittee on Oversight and Investigations. Chairman Stearns requested that CRS provide a written response to a question for the record from the October 5, 2011, subcommittee hearing entitled "Administration Efforts on Line-by-Line Budget Review." The letter was addressed to one of the authors of this memorandum, Clint Brass, who had been a witness at the hearing. Mr. Brass indicated at the hearing that additional CRS subject matter experts could respond to questions about certain topics in which they have expertise. For this topic, the two authors above are responding on behalf of CRS.¹ As per the instructions provided in the letter of request, the response below includes: (1) the name of the Member whose question is addressed; (2) the complete text of the question addressed, in bold; and (3) the CRS response, in plain text.

Information in this memorandum is drawn from publicly available sources and is of general interest to Congress. As such, all or part of this information may be provided in memoranda or reports for general distribution to Congress. The confidentiality of the requester and the questioner, as well as the text of the question, will be preserved in any case.

The Honorable Lee Terry

Are you aware of any instance where the Executive Branch has eliminated a sub-agency? Please direct this question to the appropriate person(s) at the Congressional Research Service if you do not personally know the answer to this question.

In order to address this question, it is necessary to specify what it means to "eliminate" a sub-agency. The federal government comprises many organizational subunits, some of which have been established by Congress, and some of which have been established by administrative action. From one point of view, it could be argued that a subunit is eliminated when the office is abolished or otherwise discontinued by the

¹ William L. Painter, Analyst in Emergency Management and Homeland Security Policy, also contributed to this memorandum.

authority that created it. With this understanding of the term “eliminate,” the Minerals Management Service, in the Department of the Interior, and the Analysis and Studies Division of the Internal Revenue Service, in the Department of the Treasury, are examples of subunits that were essentially eliminated. (See more below.)² Inasmuch as organizational subunits carry out general and specific statutory functions that are delegated to them by Congress or agency heads, however, it could be argued that a subunit is eliminated only when both the office and the functions it carries out are ended. Under this definition, the ability of a Secretary or agency head to use discretion to eliminate or change subunits may be constrained by the obligation to faithfully execute statutory requirements. By way of further explanation, three scenarios are laid out below: the instance in which a subunit is established by Congress via statute; the instance in which a subunit is established administratively to carry out specific statutory functions; and the instance in which a subunit is established administratively to carry out general statutory functions.

Organizational Subunit Established in Statute

Generally, where organizational subunits are established in statute, executive branch officials do not have the authority to eliminate them. For example, Congress established the Institute of Education Sciences in the Department of Education in the Education Sciences Reform Act of 2002.³ As a result, absent congressional action, an executive branch official would not be authorized to eliminate this subunit.

Organizational Subunit Established Administratively to Carry Out a Specific, Statutorily Established Function

In contrast, where a single subunit is established under the authority of a Secretary or other agency head to carry out specific statutory functions that have been assigned to the department or agency, the Secretary or agency head arguably has the authority to eliminate the subunit.⁴ Generally, Secretaries and other agency heads have implied authority to organize and manage the departments and agencies they head.⁵ Additionally, in Section 301 of Title 5 of the *U.S. Code*, Congress has provided that the “head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business.” Furthermore, since the 1950s, the powers, duties, and functions of the component offices of most agencies have been vested in the agency head, who is, in turn, empowered to delegate these powers, duties, and authorities. The agency head’s authority does not, however, supersede congressional authority to provide for specific organizational arrangements or to vest powers, duties, or authorities in particular offices established in this way.

² Administrative subunit reorganizations, which are usually accomplished by internal agency-level actions, typically are more difficult to track than statutory reorganizations.

³ P.L. 107-279, 116 Stat. 1940.

⁴ In *Myers v. United States*, 272 U.S. 52, 129 (1926), the Supreme Court declared: “[t]o Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction....” Subsequent to the decision in *Myers*, the Court has consistently recognized the authority of Congress to create and abolish offices within the executive branch, to the extent that it is generally considered settled that the transfer or abolition of statutorily vested functions may only be accomplished pursuant to congressional authorization. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *INS v. Chadha*, 462 U.S. 919, 954 (1983). In appropriations legislation, however, there are at times general provisions that can constrain an agency’s authority to reorganize. For example, Section 525 of P.L. 111-83, the Department of Homeland Security Appropriations Act, 2010 (123 Stat. 2173), has restricted the ability of the Secretary of Homeland Security to exercise a broad reorganizational authority established under the Homeland Security Act of 2002 (6 U.S.C. 452).

⁵ See Basil J. Mezines, Jacob A. Stein, and Jules Gruff, *Administrative Law*, vol. 1 (New York: Matthew Bender, 2006), pp. 4-18 to 4-27.

Notably, when the single subunit is eliminated, the statutorily prescribed functions that have been carried out by that subunit must be re-delegated to one or more existing or new organizational subunits, unless they have been repealed or the functions have been assigned elsewhere by congressional action.⁶

Such changes were undertaken at the Department of the Interior beginning in May 2010. At that time, the Minerals Management Service (MMS), which had been established by secretarial order, was carrying out a number of specific statutory requirements, such as provisions of the Federal Oil and Gas Royalty Management Act of 1982. Following the Deepwater Horizon oil spill in April 2010, Secretary of the Interior Kenneth L. Salazar initiated, by secretarial order, a reorganization of the department to address perceived conflicts among the missions of MMS.⁷ Between May 2010 and October 2011, the department carried out a plan for dividing up the functions of MMS between three new subunits. One of these—an Office of Natural Resources Revenue—is located under the Assistant Secretary for Policy, Management and Budget. The remaining two—the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement—are under the Assistant Secretary for Land and Minerals Management. As a result of these organizational changes, MMS has essentially been eliminated, and the functions it formerly carried out have been re-delegated to new organizational subunits.

Organizational Subunit Established Administratively to Carry Out a More General Statutory Function

In another case, an authorizing statute may provide substantial discretion to an agency regarding how the agency carries out its mandated activities, responsibilities, and obligations. For example, Section 305 of Title 5 of the *U.S. Code* requires most executive branch agencies to systematically review their operations to determine the degree of efficiency and economy in their activities, functions, or organizational units.⁸ The statute is silent about where or how these activities are required to occur.⁹ When an authorizing statute provides substantial discretion, but does not require the establishment of a particular organizational structure or the fulfillment of a function in a specific way, an agency head may, in the absence of other restrictions, establish or eliminate a particular subunit administratively. Such actions may be taken provided that the agency continues to carry out its statutory functions and obligations.¹⁰ The functions of a

⁶ If a function is being moved from an organizational location with one appropriations account to a location that is funded by a different appropriations account, federal appropriations law provides a process for handling the situation. In general, appropriations may be used only for purposes specified in appropriations acts. In some instances, modifications to these specifications, such as through a transfer between appropriations accounts, may be necessary to effectuate a redelegation of functions. In general, the Secretary or agency head may transfer the balance of an appropriation consistent with a lawful transfer of functions or activities (31 U.S.C. 1531). A redelegation process may be constrained, however, by more specific provisions, usually in an appropriations act, that condition or block such appropriations transfers.

⁷ U.S. Department of the Interior, Secretarial Order 3299, “Establishment of the Bureau of Ocean Energy Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resources Revenue,” issued May 19, 2010. This order was amended on June 18, 2010, to extend the deadline for development of a schedule for implementing the reorganization from “within thirty (30) days,” or by June 19, 2010, to “by July 9, 2010.” This amended order, numbered 3299A1, is available at http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3299A1.

⁸ The statute requires agencies to conduct these reviews under regulations prescribed and administered by the President.

⁹ Under the “necessary expense” doctrine of federal appropriations law, an appropriation of funds for a particular object or purpose confers authority to an agency to incur expenses which are necessary or proper or incident to the proper execution of the object or purpose. This means that an agency may, unless otherwise prohibited or directed by law, exercise some discretion in how to allocate funding among certain organizational subunits or policy priorities (such as by shifting funds within the same appropriations account), within the contours of the agency’s statutory authorities and obligations. For more information, see U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, 3rd ed., vol. I, GAO-04-261SP, January 2004, p. 4-19.

¹⁰ Nonetheless, an agency may face non-statutory constraints in its use of discretion to create, eliminate, or reorganize its (continued...)

particular abolished subunit would not necessarily need to be re-delegated, for example, if one or more existing subunits already fulfills a statutorily required, but generally prescribed function.

For example, in the late 1990s, the Internal Revenue Service (IRS) eliminated a subunit that appears to have addressed the efficiency and economy requirements of Section 305 of Title 5, while other similar subunits continued to carry out these general functions after the elimination. This process began when the Internal Revenue Service Restructuring and Reform Act of 1998 (P.L. 105-206) required the Commissioner of Internal Revenue to develop and implement a plan to reorganize the IRS from a geographical, district-based structure to a structure with organizational units that focused on particular groups of taxpayers with similar needs.¹¹ The law was otherwise silent with regard to how the national headquarters of the IRS must be structured. At the time, an Analysis and Studies Division was in operation in the agency's national headquarters in support of IRS's senior executives. This division conducted studies concerning the efficiency and effectiveness of the agency's operations. After the IRS Restructuring and Reform Act of 1998 was enacted, the Analysis and Studies Division was eliminated. Personnel from the division and other analytical units in IRS's headquarters were consolidated into the Office of Program Evaluation and Risk Analysis (OPERA).¹² After IRS's overall reorganization was implemented in 2000 with the establishment of four major operating divisions, the IRS national headquarters was further reorganized, and OPERA was located along with other units in the new headquarters Research, Analysis, and Statistics (RAS) organization.¹³

(...continued)

organizational subunits. For example, appropriations committees oftentimes include language in statutory text to prohibit reprogramming of funds within a single appropriations account that would create, eliminate, or reorganize organizational units in an agency, without advance notification. An example of this may be found in the Department of Homeland Security Appropriations Act of 2010 (P.L. 111-83; 123 Stat. 2173). In this law, Section 503 prohibited reprogramming of funds that would eliminate an organizational unit, until after the appropriations committees were notified. Notably, this was a restriction on reprogrammings, not reorganization efforts. Nonetheless, if the department wished to terminate an organizational subunit, as part of a reorganization, and use its resources for another purpose in a way that constituted a reprogramming of funds, the department would have needed to notify, and potentially work with, the appropriations committees on this subject. Some committees may use notification requirements like these to exert influence over agency actions, to ensure agencies follow congressional intent. In another case, statutory text went further to explicitly address the potential for an agency to use discretion to reorganize an agency's subunits. Specifically, the law prohibited the use of appropriated funds to relocate or reorganize an office, until after the appropriations committees were notified. Although this restriction does not prevent an agency from eventually taking action, it may encourage the involvement of Congress in the agency's decision making process. See the Omnibus Appropriations Act, 2009, Division A, Title VII, Section 712(a) (P.L. 111-8; 123 Stat. 554-555). For background on how congressional committees may use non-statutory means to influence agency actions, see CRS Report RL33151, *Committee Controls of Agency Decisions*, by Louis Fisher, formerly a senior specialist at CRS. Questions regarding this archived report may be directed to the authors of this memorandum.

¹¹ Section 1001(a); 26 U.S.C. 7801 note. See also U.S. Department of the Treasury, Internal Revenue Service, *Internal Revenue Manual*, "Part 1. Organization, Finance and Management, Chapter 1. Organization and Staffing, Section 2. IRS Organizational History", at http://www.irs.gov/irm/part1/irm_01-001-002.html.

¹² U.S. Department of the Treasury, Internal Revenue Service, "Office of Program Evaluation and Risk Analysis," memorandum from Charles O. Rossotti, Commissioner of Internal Revenue, April 2, 1999, p. 3 (available from CRS on request).

¹³ U.S. Department of the Treasury, Internal Revenue Service, *Internal Revenue Manual*, "Part 1. Organization, Finance and Management, Chapter 7. Research and Analysis for Tax Administration, Section 4. Role of Research in IRS," at http://www.irs.gov/irm/part1/irm_01-007-004.html. See also U.S. Department of the Treasury, Internal Revenue Service, *Internal Revenue Manual*, "Part 1. Organization, Finance and Management, Chapter 1. Organization and Staffing, Section 18. Research, Analysis and Statistics Division," at http://www.irs.gov/irm/part1/irm_01-001-018.html.

We trust the above response addresses the chairman's request and Representative Terry's question for the record. If we can be of additional assistance, please do not hesitate to contact us directly by telephone, or e-mail, using the contact information on the memorandum's first page.
